Supreme Court, U.S.
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No. 06-

IN THE

Supreme Court of the United States

CAROL BILLIE OSHANA,
on behalf of herself and all others similarly situated,

Petitioner,

v.

COCA-COLA COMPANY, A Delaware corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented for consideration are:

1

Whether, for purposes of determining the amount in controversy for federal diversity jurisdiction under 28 U.S.C. § 1332[1], a court may consider: (1) hypothetical claims that a plaintiff could have alleged, but did not allege, and expressly disavowed in the Complaint, (2) aggregated damages of putative class members, and (3) potential attorneys' fees incurred after the removal?

2

Whether requiring a removed plaintiff to disprove the amount in controversy, rather than requiring the removing defendant to prove the amount in controversy, violates the Rules Enabling Act and the Court's precedent?

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1. The case was filed prior to the enactment on February 18, 2005, of the Class Action Fairness Act of 2005 ("CAFA"). 28 U.S.C. § 1332. Because CAFA is not retroactive, it is inapplicable here. Pub. L. 109-2, § 9, 119 Stat. 4. ("The amendments made by this act shall apply to any civil action commenced on or after the date of enactment of this Act.").

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CITATION TO OPINION RENDERED BY COURT OF APPEALS

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at *Oshana v. Coca-Cola Co.*, 472 F.3d 506 (7th Cir. Dec. 29, 2006), *rehearing en banc denied* Jan. 29, 2007. *See* Appendix A; Appendix E.

STATEMENT OF JURISDICTION

The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

The Seventh Circuit's decision was rendered December 29, 2006, and Petitioner's petition for rehearing *en banc* was denied on January 29, 2007. *See* Sup. Ct. R. 13.

STATEMENT OF THE CASE

This consumer class action was filed on March 12, 2004, in the Circuit Court of Cook County, Illinois, asserting only state law claims against the Coca-Cola Company ("Coca-Cola") [2]. The issue before the Court involves upholding consistent standards of diversity jurisdiction among the federal Circuit Courts of Appeals.

Coca-Cola employs an unfair and deceptive marketing scheme which conceals and misleads consumers into believing that diet Coke® ("diet Coke") from the fountain ("fountain diet Coke") is the same product as the diet Coke

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2. Plaintiff Carol Billie Oshana replaced the original named plaintiff, David Hahn, on September 20, 2004. For purposes of clarity, all references to Petitioner can be treated as being to Plaintiff Oshana.

sold in cans and bottles ("bottled diet Coke"). Unlike bottled diet Coke, which is sweetened exclusively with aspartame, fountain diet Coke is sweetened with a mixture of aspartame and saccharin. Coca-Cola has known since 1984 that consumers were being deceived and unfairly informed by its conduct, but has failed to stop and continues its deceptive and unfair practices. As a result of this practice, Coca-Cola has sold millions of dollars in beverages that it would not have otherwise sold and has been unjustly enriched at the expense of Plaintiff and the public. The original complaint filed in this action ("Complaint") alleged claims for unjust enrichment and violations of the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1, *et seq.*

The Complaint contained an express *ad damnum* that "Plaintiff seeks no relief, cause of action, remedy, or damages that confer federal jurisdiction upon the claims asserted herein, and expressly disclaims individual damages in excess of $75,000." The Complaint sought disgorgement of Coca-Cola's profits on a class-wide basis, but did *not* assert a claim for punitive damages. While the case was in state court, despite the express *ad damnum* clause, on April 6, 2004, Coca-Cola served Petitioner with five Requests for Admissions, pursuant to the District Court for the Northern District of Illinois's Local Rule 81.2 ("Local Rule 81.2") and Illinois Supreme Court Rule 216, seeking admissions regarding what Petitioner's future litigation strategy *might* be in the event that the Court denied a *future* motion for class certification. On May 6, 2004, Petitioner timely filed and served her responses to said requests, in which, pursuant to Illinois Supreme Court Rule 216(c), Petitioner objected to each request on various grounds.

On May 24, 2004, Coca-Cola removed this case to federal court, relying on Local Rule 81.2, and claimed that Petitioner's objections to Coca-Cola's Requests for Admission formed its belief that this case satisfied the amount in controversy requirement for diversity jurisdiction. According to Coca-Cola, Petitioner's timely objections to the requests amounted to a refusal to admit. Petitioner filed a motion to remand, which was denied, as was her motion for reconsideration. *See Hahn v. Coca-Cola Co.*, Minute Order, July 30, 2004 (Appendix C); *Hahn v. Coca-Cola Co.*, Minute Order, July 19, 2004 (Appendix D). The district court ultimately denied Petitioner's motion for class certification, as well as, in part, Coca-Cola's two attempts at obtaining summary judgment in its favor. *See Oshana v. Coca-Cola Co.*, 225 F.R.D. 575 (N.D. Ill. 2005); *Oshana v. Coca-Cola Co.*, 2005 WL 1661999 (N.D. Ill. July 13, 2005). Coca-Cola tendered an Offer of Judgment pursuant to Fed. R. Civ. P. 68, which offered all of the individual relief claimed by Petitioner—$650. *See* Order of Judgment Under Rule 68, Aug. 4, 2005 (Appendix B). An appeal to the Seventh Circuit Court of Appeals of the decision denying the underlying jurisdictional issue and class certification followed.

On appeal, the Seventh Circuit affirmed the district court's denial of remand. *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 515 (2006) (Appendix A). The court found that Petitioner's refusal to stipulate to damages of less than $75,000 plus a penny, solely in the event that class certification was denied, raised the inference that she could have claims in excess of $75,000, even though they were not pled and, in fact, were disavowed in the operative Complaint. *Id.* at 512. In holding that the amount in controversy exceeded $75,000, the court pointed to Petitioner's requests for actual damages, disgorgement of

profits, and attorneys' fees. *Id.* The court noted that it was "doubtful that [Petitioner] could force Coke to cough up *all* of its profits from the sale of fountain Diet Coke in Illinois just by showing she alone had been deceived." *Id.* The court also considered a potential claim for punitive damages, which Petitioner had not sought in her Complaint. *Id.*

REASONS FOR GRANTING THE PETITION

Petitioner respectfully submits that the Seventh Circuit's holding conflicts with the Supreme Court's holding in *Snyder v. Harris*, 394 U.S. 332, 335 (1969), and the holdings of every other federal Circuit Court of Appeals to consider the issue of aggregating damages—both punitive and actual—and attorneys' fees. To the extent that the court considered such additional damages and fees incurred by other putative class members as a basis for meeting the amount in controversy, such a consideration was improper. The opinion, if left standing, would wreak havoc upon the established clarity of this fundamental issue of federal jurisdiction.

The Seventh Circuit's opinion also violates the Rules Enabling Act, 28 U.S.C. § 2071(a) and the Court's precedent, and conflicts with the rulings of other federal Circuit Courts of Appeals. The opinion alters the substantive requirements for establishing federal diversity jurisdiction by: (i) refusing to measure the amount in controversy by what Petitioner is actually claiming in her Complaint at the time it was filed, and (ii) shifting the burden to Petitioner to affirmatively prove that the amount in controversy requirement *could not* be met if she were to ever allege *additional* claims in the future. The opinion turns well-established principles of federal

jurisdiction on their head, and the resulting conflict with other federal Circuit Courts of Appeals must be resolved.

The Seventh Circuit's ruling shakes the very foundation of federal courts which are courts of limited jurisdiction, as mandated by Article III of the Constitution of the United States. In fact, its effects have had an immediate impact. For example, in *Oshana v. PepsiCo Inc.*, No. 07 C 352, 2007 WL 1141941 (N.D. Ill. Apr. 13, 2007), a case alleging the same type of claims as Petitioner has here, the district court ruled that it was constrained by the Seventh Circuit's ruling and forced to accept the defendant's third attempt at removal. Despite two previous orders of remand, and in light of the Seventh Circuit's decision here, the court held that "[i]t is clear that this court and the Court of Appeals applied somewhat differing standards in determining jurisdiction—and the views of the appellate court control." *Id.* at *1.

Petitioner respectfully submits that a decision by the Court is needed to ensure consistency amongst the federal courts on this important question of federal jurisdiction, and to provide guidance to plaintiffs on jurisdictional pleading requirements.

ARGUMENT

I. The Opinion Conflicts with Long-Standing Principles of Diversity Jurisdiction Established by the Court and the Circuit Courts of Appeals.

The Seventh Circuit based its decision on the assumption that the amount in controversy was met via a combination of Coca-Cola's requests for admissions relating to its theories on damages, a hypothetical claim for punitive damages (which were never sought in Petitioner's Complaint), Petitioner's claim for disgorgement of Coca-Cola's profits on a class-wide basis, and Petitioner's request for attorneys' fees. *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 512 (7th Cir. 2006); Appendix A, 9a. However, even if Petitioner had the burden to disprove the amount in controversy, which she did not, pursuant to the Court's binding authority and the holdings of the federal Circuit Courts of Appeals, her claims did not exceed $75,000 at the time of removal.

A. The Opinion Impermissibly Ignores Federal Pleading Standards and Violates the Court's Rule Against Aggregating Damages When Determining the Amount in Controversy.

The Seventh Circuit impermissibly considered a claim for punitive damages when determining the amount in controversy, despite the fact that Petitioner never alleged any such claim in her Complaint. In fact, Petitioner expressly disclaimed all combinations of damages exceeding $75,000. This disclaimer would also have applied to any disgorgement

damages;[3] such disclaimers have long-standing acceptance by federal courts. "[T]he plaintiff is the master of the complaint." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 398–99 (1987). Yet, if the Court allows the Seventh Circuit's decision to stand, wherein it considered a claim *not* sought by Petitioner in determining the amount in controversy, then, effectively, "the plaintiff would be master of nothing." *Id.* at 399. Given that whether a case is removable "is to be determined by the allegations of the complaint," the absence of any such claim for punitive damages precludes their consideration. *Great Northern Ry. Co. v. Alexander*, 246 U.S. 276, 281 (1918). In doing so, the Seventh Circuit ran afoul of long-standing precedent. The Seventh Circuit's analysis did not turn on what was alleged in Petitioner's Complaint, but instead rested upon what other theoretical claims Petitioner might have that she chose not to allege.

The Seventh Circuit also relied on Petitioner's claims for compensatory damages and disgorgement of profits as part of the basis of its ruling. *Oshana*, 472 F.3d at 512; Appendix A, 9a. However, Petitioner's claims in this regard could not have met the amount in controversy, as the only relevant damages and profits were those sustained by

3. On, September 29, 2004, Petitioner filed an amended complaint that, while preserving her earlier objections, conformed to the court's rulings denying her motion to remand. Accordingly, the amended complaint removed the disclaimer of damages in excess of $75,000 and added allegations of a common undivided interest in the complete disgorgement of Coca Cola's ill-gotten Illinois profits, while expressly stating that she was only doing so because "Coca Cola's basis for removal is that Plaintiff . . . [has] the right to disgorge all of the profits Coca Cola has made from the sale of its product in Illinois as a result of its improper conduct," and the district court had accepted that theory. These allegations were not included, however, in the original Complaint on which removal was based.

Petitioner and specifically bestowed upon Coca-Cola by Petitioner, respectively. In *Snyder v. Harris*, the Court held that "[w]e have consistently interpreted the jurisdictional statute passed by Congress as not conferring jurisdiction where the required amount in controversy can be reached only by aggregating separate and distinct claims." 394 U.S. 332, 336 (1969). Every federal Circuit Court of Appeals to consider the issue of aggregation of damages under these circumstances has rejected it as running afoul of the Court's holding in *Snyder v. Harris*. *See Gilman v. BHC Sec., Inc.*, 104 F.3d 1418 (2d Cir. 1997); *Garcia v. Koch Oil Co. of Tex., Inc.*, 351 F.3d 636, 641 (5th Cir. 2003); *Everett v. Verizon Wireless, Inc.*, 460 F.3d 818, 826 (6th Cir. 2006); *Crawford v. F. Hoffman-La Roche, Ltd.*, 267 F.3d 760, 766 (8th Cir. 2001); *Gibson v. Chrysler Corp.*, 261 F.3d 927 (9th Cir. 2001); *Martin v. Franklin Capital Corp.*, 251 F.3d 1284 (10th Cir. 2001); *Morrison v. Allstate Indem. Co.*, 228 F.3d 1255 (11th Cir. 2000).

Despite these decisions, the Seventh Circuit held that Petitioner's disgorgement claim "alone would put this case securely over the amount in controversy were it not doubtful that Oshana could force Coke to cough up *all* of its profits from the sale of fountain Diet Coke in Illinois just by showing that she alone had been deceived." *Oshana*, 472 F.3d at 512 (emphasis in original); Appendix A, 9a. Such a suggestion is legally untenable and in direct opposition to Supreme Court precedent.

The Seventh Circuit then held that "some degree of disgorgement" should be attributed to Petitioner. *Id.* While the court did not state what that degree was, it is axiomatic that the disgorgement of profits relating to Petitioner's individual purchases must be limited to the profits made from Petitioner's individual purchases. Because an action for

disgorgement is a remedy for restitution, it is limited to "restoring the status quo and ordering the return of that which rightfully belongs to the purchaser." *Tull v. United States*, 481 U.S. 412, 424 (1987). Accordingly, as a matter of law, the disgorgement claim could not have added anything to the amount in controversy other than those profits retained by Coca-Cola that were specifically attributable to Petitioner.

Even if Petitioner had sought punitive damages in the absence of an express disclaimer, it would have been a legal certainty that such damages, when combined with the compensatory damages, disgorgement of profits, and attorneys' fees, could not have exceeded $75,000. The Court has indicated that, for a consumer claim alleging only economic damage—without any physical harm—punitive damages probably should not exceed a "single digit" ratio, or they may risk being unconstitutional. *State Farm Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 424–26 (2003). The Complaint expressly stated that "the only [individual] damages sought by this complaint are Plaintiff's individual damages in the amounts that [she] spent on Coca-Cola products that [she] would not have otherwise purchased," in addition to individual and class-wide disgorgement of Coca-Cola's profits. As the Seventh Circuit observed here, this claim was for "about $1,000 in actual damages." *Oshana*, 472 F.3d at 510; Appendix A, 3a. Thus, even assuming, *arguendo*, that Petitioner incurred $50,000 in attorneys' fees prior to removal, this would still require punitive damages of twenty-five times her actual damages, an amount that, certainly in this context, is likely unconstitutional and, moreover, is not a part of Petitioner's claim.

Furthermore, as noted above, punitive damages cannot be aggregated for purposes of determining removal

jurisdiction. Thus, even *if* Petitioner had asserted a punitive damages claim, applying an outer limit of ten times the $1,000 in compensatory damages would have only added $10,000 to the amount in controversy, a far cry from the requisite $75,000 plus a penny threshold. Unless the Court reverses the Seventh Circuit's decision, it will directly conflict with the Court's precedent and the holdings of every other federal Circuit Court of Appeals to consider the issue, thereby opening the floodgates for unjustified removal of a substantial number of cases and further burdening the already overcrowded federal dockets.[4]

B. The Opinion Conflicts with the Majority of the Circuit Courts of Appeals on the Issue of Assessing Attorneys' Fees When Determining the Amount in Controversy.

Only the amount of attorneys' fees incurred up to the filing of the Complaint may be considered in determining the amount in controversy. *See, e.g., Gardynski-Leschuck v. Ford Motor Co.*, 142 F.3d 955, 958 (7th Cir. 1998). The only evidence that the Seventh Circuit considered regarding attorneys' fees was what the court viewed as Petitioner's

4. The enactment of CAFA does not moot the issues presented here, but rather heightens the need to correct the Seventh Circuit's decision. CAFA has already led to an increased number of class action removals because claims can now be aggregated, provided that the additional requirements of CAFA are met. Under the Seventh Circuit's analysis, removing defendants can argue, in the alternative, that even if the case is not removable under CAFA (or if remand would be discretionary under CAFA), removal jurisdiction exists independently whenever there is a disgorgement claim or the plaintiff has not otherwise disproven the amount in controversy. *See, e.g., Oshana v. PepsiCo Inc.*, No. 07 C 352, 2007 WL 1141941 (N.D. Ill. Apr. 13, 2007).

refusal to stipulate that attorneys' fees would not exceed $75,000 for the whole litigation, as set forth in Coca-Cola's requests for admissions. *Oshana*, 472 F.3d at 512; Appendix A, 9a. However, the court overlooked a key fact in this regard: Coca-Cola *never* asked Petitioner to admit to anything regarding the fees incurred *at the time of filing*, or even at the time of removal, which the court focused on, for that matter. On the contrary, Coca-Cola only sought admissions regarding the total amount of attorneys' fees Petitioner would seek if she prevailed. To wit, the requests to admit stated:

> Admit that you will not seek an award of attorneys' fees in excess of $75,000 in the event that a class is not certified.
>
> * * *
>
> Admit that you will not seek an award of compensatory damages, attorneys' fees and punitive damages totaling in excess of $75,000 in the event that a class is not certified.
>
> * * *
>
> Admit that you will not seek an award of disgorgement, attorneys' fees and punitive damages totaling in excess of $75,000 in the event that a class is not certified.

Thus, even within the confines of the court's legal reasoning, it erred by misapprehending what the requests for admissions actually sought. These requests cannot be said to have elicited any information regarding what the attorneys' fees were at the time of removal. It is noteworthy that a defendant controls, in part, the ultimate amount of attorneys' fees incurred, depending on how long they choose to drag out

litigation. To hold otherwise would permit defendants to remove any class action to federal court in the absence of an express disclaimer that plaintiffs' attorneys will *never* seek any award of attorneys' fees in excess of $75,000. As the court's reasoning illustrates, the decision completely ignores the amount in controversy *at the time of filing*, or even at the time of removal, and instead impermissibly focuses on what Petitioner *might* have sought at some point down the road. This is not just a matter of error. It is an abandonment of the fundamental principle that federal courts are courts of limited jurisdiction.

While the court's holding only impliedly suggests that attorneys' fees can be aggregated, this notion again conflicts with other federal Circuit Courts of Appeals which have addressed the issue and held that, for purposes of diversity jurisdiction, attorneys' fees in a class action may not be aggregated, but rather assigned on a pro rata basis. *See, e.g.*, *Coghlan v. Wellcraft Marine Corp.*, 240 F.3d 449, 455 n.5 (5th Cir. 2001); *Goldberg v. CPC Int'l, Inc.*, 678 F.2d 1365, 1367 (9th Cir. 1982); *Martin v. Franklin Capital Corp.*, 251 F.3d 1284, 1293 (10th Cir. 2001); *Morrison v. Allstate Indem. Co.*, 228 F.3d 1255, 1266–68 (11th Cir. 2000). In light of the millions of class members affected by Coca-Cola's deceptive and misleading conduct, any such amount of attorneys' fees attributable to Petitioner would be minimal.

There is absolutely no evidence, nor any reasonable basis to believe, that Petitioner had more than a small amount of attorneys' fees incurred at the time of the filing of the Complaint, or even at the time of removal. Thus, the Seventh Circuit's treatment of attorneys' fees conflicts with the holdings of the other federal Circuit Courts of Appeals to address this issue, and must be reversed and brought into conformity with them.

II. The Opinion Violates the Rules Enabling Act by Improperly Shifting the Burden to Petitioner to Prove That the Amount in Controversy Has Not Been Met.

The Seventh Circuit's opinion creates a problem that Judge Easterbrook of the same court warned of in *Rubel v. Pfizer*: that if Local Rule 81.2 were applied in a way that altered the requirements for establishing removal jurisdiction, it would be invalid pursuant to the Rules Enabling Act, 28 U.S.C. § 2071(a).[5] 361 F.3d 1016, 1020 (7th Cir. 2004). This is precisely what happened here. Despite the fact that the Complaint sought a small amount of individual damages (approximately $1,000), and expressly put not more than $75,000 in controversy—while affirmatively disclaiming in excess of such an amount—the court found that Coca-Cola had established the amount in controversy by virtue of Petitioner's purported failure to meet her new-found burden of further disavowing, and somehow disproving, the amount in controversy. *Oshana*, 472 F.3d at 512; Appendix A, 9a.

As the court specifically noted, Coca-Cola had the burden to "establish that at the time of removal [Petitioner] personally had *placed* over $75,000 in controversy." *Oshana*, 472 F.3d at 511; Appendix A, 6a (emphasis added). The court answered this question: "On the face of Oshana's state-court complaint, she did not." *Id.* This resolved the issue, and compelled remanding the case. Yet the court went on to further evaluate what other claims Petitioner *could* have *theoretically* made, but chose not to make. This course of action was an improper basis for determining federal jurisdiction and conflicts with, *inter alia*, the Court's decision

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5. In fact, Local Rule 81.2 was later revoked by the District Court for the Northern District of Illinois, effective April 25, 2005.

in *Great Northern Ry. Co. v. Alexander*, which held that the defendant's conduct there did "not convert a nonremovable case into a removable one, in the absence of voluntary action on the part of the plaintiff, and it therefore results that the defendant did not at any time have the right to remove the case to federal court." 246 U.S. 276, 282 (1918). The same principle holds true here. Consequently, this shifting of the burden is inconsistent with existing Supreme Court precedent, as well as the settled precedent of other federal Circuit Courts of Appeals, and is therefore impermissible. *See Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97 (1921); *United Food & Commercial Workers Union, Local 919 v. CenterMark Prop. Meridian Square, Inc.*, 30 F.3d 298, 305 (2d Cir. 1994); *St. Paul Reinsurance Co. v. Greenberg*, 134 F.3d 1250, 1253 (5th Cir. 1998); *Gafford v. Gen. Elec. Co.*, 997 F.2d 150, 158 (6th Cir. 1993); *Martin v. Franklin Capital Corp.*, 251 F.3d 1284 (10th Cir. 2001).

Furthermore, in relying on the requests for admissions promulgated by Coca-Cola pursuant to Local Rule 81.2, the court overlooked the fact that none of Coca-Cola's requests asked for admissions related to what Petitioner demanded in her Complaint. Instead, Coca-Cola's requests asked for work product and attorney-client information concerning whether Petitioner *might* change her demands if class certification were denied—a purely hypothetical scenario which would occur in the distant future of the litigation, if ever. Notably, Petitioner did not fail to respond to these requests, but rather served timely objections that Coca-Cola *never* met, nor did it seek a ruling on them from the court (as was required by applicable Illinois law under which the requests were promulgated). *See* Ill. S. Ct. R. 216. Yet, the district court, as well as the Seventh Circuit, treated the timely objections by Petitioner as a refusal to admit that the amount in

controversy was not met. *Oshana*, 472 F.3d at 512; Appendix A, 9a; *Hahn v. Coca-Cola Co.*, Minute Order, July 19, 2004; Appendix D, 26a. In doing so, the court violated the *Erie* doctrine by allowing federal procedure (Local Rule 81.2) to extinguish Petitioner's state law created rights (the litigation privileges).[6] *See Hanna v. Plumer*, 380 U.S. 460 (1965).

Moreover, the court's opinion not only effectively required Petitioner to disprove the amount in controversy, but went so far as to require Petitioner to prove that she would *never* assert any combination of claims exceeding the amount in controversy at any point in the *future* of the litigation, regardless of what claims she had actually chosen to assert in her Complaint. Thus, the court's opinion impermissibly shifted the burden of proving that Petitioner's claims actually exceeded $75,000 from Coca-Cola to Petitioner, essentially creating a rebuttable presumption against Petitioner that her claims—both those alleged in her complaint as well as any future hypothetical claims—do indeed exceed the jurisdictional minimum. Such a standard is in violation of the Court's well-established precedent, and consequently, cannot be allowed to stand. *See Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97 (1921) (burden rests on defendant in a removal action to prove amount in controversy is sufficient); *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936) (defendants seeking removal must meet this burden by a preponderance of the evidence).

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6. Moreover, the Seventh Circuit's opinion raises Due Process concerns, as a party who is following proper state law procedure and court rules is subject to adverse consequences from a different court for doing what the law allows her to do.

In the interests of legal consistency and increased certainty for litigants and the federal courts, Petitioner submits that the Court should accept jurisdiction over this matter.

CONCLUSION

For the reasons stated, Petitioner Carol Billie Oshana respectfully requests that the Court accept review of this legal controversy, and further requests an Order 1) reversing the judgment of the Seventh Circuit which affirmed removal of her case to federal court based on the jurisdictional amount in controversy being in excess of $75,000, and 2) remanding this case to the Circuit Court of Cook County, Illinois, for further proceedings on Petitioner's state law claims.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED DECEMBER 29, 2006

In the
UNITED STATES COURT OF APPEALS
for the Seventh Circuit

No. 05-3640

CAROL B. OSHANA,

Plaintiff-Appellant,

v.

COCA-COLA COMPANY, a Delaware corporation,

Defendant-Appellee.

Argued March 29, 2006—Decided December 29, 2006.

Before BAUER, KANNE, and SYKES, *Circuit Judges*.

SYKES, *Circuit Judge*. This putative class action alleges the Coca-Cola Company ("Coke") deceived Diet Coke® consumers in Illinois by failing to disclose that fountain Diet Coke and bottled Diet Coke are not the same product. Fountain Diet Coke contains a blend of the sweeteners aspartame and saccharin; bottled Diet Coke is sweetened only with aspartame. The plaintiff's lawyers, on behalf of a prior named class representative and a class of all Illinois purchasers of fountain Diet Coke from March 12, 1999

forward, initially filed the lawsuit in Illinois state court alleging that Coke violated the Illinois Consumer Fraud and Deceptive Practices Act ("ICFA") and was unjustly enriched. Coke removed the lawsuit to federal court, defeated class certification, and eventually offered a substituted named plaintiff, Carol Oshana, a judgment of $650, which she accepted. Oshana reserved the right to challenge on appeal the district court's jurisdiction and the order denying class certification. We affirm.

I. Background

Oshana filed this lawsuit in Illinois state court alleging Coke tricked consumers into believing that fountain Diet Coke and bottled Diet Coke have the same ingredients.[1] In fact, bottled Diet Coke is sweetened with aspartame, while fountain Diet Coke is sweetened with a mixture of aspartame and saccharin. The additional ingredient in fountain Diet Coke apparently addresses concerns about the staying power of aspartame as a sweetener in fountain syrup. Oshana complained, in relevant part, that Coke began advertising in 1984 that Diet Coke would be sweetened with 100% NutraSweet® brand aspartame, leading consumers to believe that all forms of Diet Coke would follow that formula, even though fountain Diet Coke continued to use saccharin.

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1. Oshana was not the original named plaintiff in this lawsuit. David Hahn, the initial plaintiff and proposed class representative, voluntarily withdrew after moving for class certification, and Oshana was substituted. Because Oshana is the named plaintiff as the case comes to us, we refer only to Oshana.

Appendix A

Consistent with Illinois practice, Oshana did not claim an amount of damages in her complaint. She did, however, disclaim individual damages over $75,000. She sought compensatory damages, disgorgement of Coke's profits from the sale of fountain Diet Coke in Illinois, attorneys' fees and costs, and any other relief the court saw fit to grant.

Coke thought that Oshana's disclaimer of individual damages was unclear. It asked her to formally admit that in the event a class was not certified, Oshana would not individually seek disgorgement of all Coke profits from the sale of fountain Diet Coke in Illinois. Coke also asked Oshana to admit she would not individually seek an award of attorneys' fees over $75,000; punitive damages over $75,000; a combined award of compensatory and punitive damages and attorneys' fees over $75,000; or a combined award of disgorgement, attorneys' fees, and punitive damages over $75,000. Oshana refused to do so.

Coke removed the case to federal court invoking diversity jurisdiction and claiming a good-faith belief that the amount in controversy in fact exceeded the $75,000 threshold. *See* 28 U.S.C. § 1332. Oshana moved to remand; she argued the complaint unambiguously disclaimed individual damages in excess of $75,000 so that federal jurisdiction could not exist. The district court denied Oshana's motion to remand, concluding that Coke had established Oshana's damages could plausibly exceed $75,000. Oshana's refusal to admit otherwise reinforced the district court's conclusion. Defeated, Oshana filed an amended complaint in federal court praying for about $1000 in actual damages and, either as a class or individually,

disgorgement of millions in Coke profits from the sale of fountain Diet Coke in Illinois.

The district court denied class certification, holding that Oshana could not satisfy the requirements of Federal Rule of Civil Procedure 23(a) or Rule 23(b). The district court held that Oshana's proposed class—"All individuals who purchased for consumption and not resale fountain Diet Coke in . . . Illinois from March 12, 1999, through the date of entry of an order certifying the class"—was not sufficiently ascertainable. The class could potentially include millions of customers, some (if not many) of whom may not have been deceived by Coke's marketing because at least some of Coke's ads contained a disclaimer. The court also held that Oshana could not show her claims to be typical of the class. *See* Fed.R.Civ.P. 23(a)(3). Oshana claimed she was deceived by Coke's marketing, but Coke's marketing may have been only a minor factor in the purchasing decisions of other class members. Moreover, some putative class members may have known about the presence of saccharin and bought fountain Diet Coke anyway. Finally, the district court concluded that Oshana could not satisfy any of the requirements of Rule 23(b).

The district court then partially granted Coke's summary judgment motion, limiting Oshana's claims because of the statute of limitations and holding that Oshana could not personally collect all of Coke's disgorged profits from the sale of fountain Diet Coke in Illinois if she prevailed on the merits. Instead, the court held she could recover only the $650 in damages she personally incurred. Coke made an offer of judgment for $650 plus reasonable attorneys' fees and costs

(to be determined by the district court), *see* Fed.R.Civ.P. 68, and Oshana accepted, reserving the right to appeal the issues of jurisdiction and the denial of class certification.

II. Discussion

A. Jurisdiction

Oshana's first argument is that her case never belonged in federal court. She maintains that $75,000 was never in controversy because she disclaimed damages in excess of the federal jurisdictional amount in her state-court complaint. Although the *amended* complaint sought millions in individual damages (by way of Coke's disgorged profits), Oshana argues that the amount in controversy was not satisfied because it is measured only at the time of removal and is not affected by later amendments. We need not concern ourselves with the effect of the amended complaint in this case because removal was proper.

We review the propriety of removal de novo. *Boyd v. Phoenix Funding Corp.*, 366 F.3d 524, 529 (7th Cir.2004). A defendant has the right to remove a case from state to federal court when the federal court could exercise jurisdiction in the first instance. 28 U.S.C. § 1441. In this case, subject-matter jurisdiction could be based only on diversity of citizenship. 28 U.S.C. § 1332. There is no question that the parties are diverse—Oshana is an Illinois citizen (as was her predecessor) and Coke is a Delaware corporation with its principal place of business in Georgia. The only question for us is whether the amount in controversy exceeded $75,000.

Appendix A

The amount in controversy is the amount required to satisfy the plaintiff's demands in full on the day the suit begins, *Hart v. Schering-Plough Corp.*, 253 F.3d 272, 273 (7th Cir.2001), or in the event of removal, on the day the suit was removed, *BEM I, L.L.C. v. Anthropologie, Inc.*, 301 F.3d 548, 552 (7th Cir.2002). Because Coke is the proponent of jurisdiction, it has the burden of showing by a preponderance of the evidence facts that suggest the amount-in-controversy requirement is met. *Meridian Sec. Ins. Co. v. Sadowski*, 441 F.3d 536, 543 (7th Cir.2006). That is easier said than done when the plaintiff, the master of the complaint, does not want to be in federal court and provides little information about the value of her claims. In such a case, a good-faith estimate of the stakes is acceptable if it is plausible and supported by a preponderance of the evidence. *See, e.g.*, *Rubel v. Pfizer, Inc.*, 361 F.3d 1016, 1020 (7th Cir.2004). Once the defendant in a removal case has established the requisite amount in controversy, the plaintiff can defeat jurisdiction only if "it appears to a legal certainty that the claim is really for less than the jurisdictional amount." *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 289, 58 S.Ct. 586, 82 L.Ed. 845 (1938); *Meridian Sec.*, 441 F.3d at 541.

In a class action, the amount in controversy must be satisfied by one of the named plaintiffs; aggregating claims is not allowed for purposes of determining the jurisdictional amount.[2] *Del Vecchio v. Conseco, Inc.*, 230 F.3d 974, 977

2. The Class Action Fairness Act of 2005 ("CAFA") did away with the nonaggregation rule. *See* 28 U.S.C. § 1332(d)(6). But this case was filed before CAFA was enacted and CAFA is not retroactive. (Cont'd)

(7th Cir.2000); *Garbie v. DaimlerChrysler Corp.*, 211 F.3d 407, 409 (7th Cir.2000); *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 607 (7th Cir.1997). Once one plaintiff satisfies the amount-in-controversy requirement for diversity jurisdiction, the other plaintiffs come in under the court's supplemental jurisdiction regardless of whether their individual claims satisfy the requirements of § 1332. 28 U.S.C. § 1367; *Exxon Mobil v. Allapattah Servs., Inc.*, 545 U.S. 546, 125 S.Ct. 2611, 2615, 162 L.Ed.2d 502 (2005); *In re Brand Name Prescription Drugs*, 123 F.3d at 607;*Stromberg Metal Works, Inc. v. Press Mach., Inc.*, 77 F.3d 928, 930-33 (7th Cir.1996). So Coke must establish that at the time of removal Oshana personally had placed over $75,000 in controversy.

On the face of Oshana's state-court complaint, she did not. She expressly disclaimed individual damages over $75,000: "Plaintiff seeks no relief, cause of action, remedy or damages that would confer federal jurisdiction upon the claims asserted herein, and expressly disclaims individual damages in excess of $75,000." Such disclaimers have been long approved as a way of staying out of federal court, *see St. Paul Mercury*, 303 U.S. at 294, 58 S.Ct. 586, but only when the disclaimer is binding. *BEM I, L.L.C.*, 301 F.3d at 552; *The Barbers, Hairstyling for Men & Women, Inc. v. Bishop*, 132 F.3d 1203, 1205 (7th Cir.1997). Illinois does not bind plaintiffs to such disclaimers in complaints—like

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(Cont'd)

Pub.L. 109-2, § 9, 119 Stat. 14 ("The amendments made by this act shall apply to any civil action commenced on or after [February 18, 2005]."); *Exxon Mobil v. Allapattah Servs., Inc.*, 545 U.S. 546, 125 S.Ct. 2611, 2627-28, 162 L.Ed.2d 502 (2005).

in federal court, plaintiffs in Illinois are not limited to the amounts they've requested. So Oshana's disclaimer had no legal effect. 735 Ill. Comp. Stat.. 5/2-604 (2004); *BEM I, L.L.C.*, 301 F.3d at 552; *The Barbers*, 132 F.3d at 1205. If Oshana really wanted to prevent removal, she should have stipulated to damages not exceeding the $75,000 jurisdictional limit. *BEM I, L.L.C.*, 301 F.3d at 552; *Workman v. United Parcel Service, Inc.*, 234 F.3d 998, 1000 (7th Cir.2000); *Chase v. Shop 'N Save Warehouse Foods, Inc.*, 110 F.3d 424, 430 (7th Cir.1997); *In re Shell Oil Co.*, 970 F.2d 355, 356 (7th Cir.1992) ("Litigants who want to prevent removal must file a binding stipulation or affidavit with their complaints. . . ."). A stipulation would have had the same effect as a statute that limits a plaintiff to the recovery sought in the complaint. *BEM I, L.L.C.*, 301 F.3d at 552.

The complaint sought several types of damages: actual damages; disgorgement of Coke's profits from the sale of fountain Diet Coke in Illinois; and attorneys' fees. Coke asked Oshana to admit in formal Requests for Admission that in the event the class was not certified, she would not personally seek (1) disgorgement of Coke's profits; (2) punitive damages in excess of $75,000; (3) attorneys' fees in excess of $75,000; (4) an award of compensatory and punitive damages and attorneys' fees in excess of $75,000; or (5) an award of disgorgement, punitive damages, and attorneys' fees in excess of $75,000. Oshana refused to admit any of those things. So when the district court considered whether jurisdiction was proper, it had only Coke's good-faith belief that the amount in controversy exceeded $75,000, facts suggesting the amount Oshana sought may exceed $75,000, and Oshana's refusal to say otherwise.

Appendix A

Oshana's refusal to admit that she would not seek individual damages in excess of $75,000 worked against her. As we said in *Workman*, if the plaintiff does not stipulate to damages of $75,000 or less, "the inference arises that he thinks his claim may be worth more." 234 F.3d at 1000. Although the complaint said nothing about the amount of Oshana's actual damages, Coke's profits from the sale of fountain Diet Coke in Illinois during the relevant time period stretched into the millions. That alone would put this case securely over the amount in controversy were it not doubtful that Oshana could force Coke to cough up *all* of its profits from the sale of fountain Diet Coke in Illinois just by showing she alone had been deceived. But attorneys' fees up to the time of removal also count toward the jurisdictional amount, *see Smith v. Am. Gen'l Life & Accident Ins. Co.*, 337 F.3d 888, 896-97 (7th Cir.2003); *Hart*, 253 F.3d at 273; *Gardynski-Leschuck v. Ford Motor Co.*, 142 F.3d 955, 957 (7th Cir.1998), and an award of fees is properly considered in addition to compensatory damages and some degree of disgorgement. Oshana's refusal to admit that the combination of these recoveries would not exceed $75,000 raised the reasonable inference that it would.

Finally, although the complaint was silent about punitive damages, the ICFA permits recovery of punitive damages, and Oshana could have amended her state court complaint to seek a punitive damages award. Oshana's refusal to admit she would not seek more than $75,000 in compensatory damages, disgorged profits (recoverable individually), punitive damages, and attorneys' fees makes it plausible that more than $75,000 was at stake. Removal was proper.

This result is only fair. Oshana cannot benefit by playing a cat-and-mouse game, purporting to disclaim damages in excess of $75,000 but refusing to admit or stipulate that her damages will not exceed that amount. *See Rubel*, 361 F.3d at 1020 ("[P]laintiffs can't prevent removal by refusing to concede that the controversy exceeds the jurisdictional minimum") A contrary result would be unjust. Oshana might have returned to state court and after the time had passed for removal, *see* 28 U.S.C. § 1446(b), amended her complaint to seek punitive damages and recovered more than $75,000. Coke wanted either to avail itself of federal jurisdiction (to which it was entitled if the amount in controversy was more than $75,000) or secure a binding commitment from Oshana that her claims did not exceed $75,000. Oshana cannot have it both ways—she cannot disclaim damages in excess of $75,000 in order to defeat federal jurisdiction but preserve her right to recover more than that amount by refusing to admit or stipulate to the jurisdictional limit.

Oshana argues that the district judge's ultimate holding that she could not individually recover more than $650 as a matter of law shows that it was a legal certainty all along that her claim did not exceed the jurisdictional minimum. Not so. Whether she *actually* recovers more than $75,000 is immaterial; what matters is the amount put in controversy on the day of removal. *BEM I, L.L.C.*, 301 F.3d at 552. On the day of removal, the district court had not narrowed the scope of Oshana's claims, but did so only at the time of the summary judgment motion in concluding that damages could be no more than $650. Also, as we have noted, it was not clear on the day of removal that Oshana would not seek or recover punitive damages, because she refused to stipulate

or admit she would not. Moreover, it was not clear at the time of removal that adding attorneys' fees to compensatory and punitive damages and individually recoverable disgorged profits would total less than $75,000. There is no reason to believe *on the day the case was removed* that it was *legally impossible* for Oshana to recover more than $75,000. *See Workman*, 234 F.3d at 999.

B. Class Certification

Oshana also challenges the district court's decision not to certify a class. The district court may certify a class of plaintiffs if the putative class satisfies all four requirements of Federal Rule of Civil Procedure 23(a)—numerosity, commonality, typicality, and adequacy of representation—and any one of the conditions of Rule 23(b). Fed.R.Civ.P. 23; *Williams v. Chartwell Fin. Servs., Ltd.*, 204 F.3d 748, 760 (7th Cir.2000). The plaintiff must also show (it is the plaintiff's burden to prove the class should be certified, *Trotter v. Klincar*, 748 F.2d 1177, 1184 (7th Cir.1984)) that the class is indeed identifiable as a class. *Simer v. Rios*, 661 F.2d 655, 669 (7th Cir.1981) ("It is axiomatic that for a class action to be certified a 'class' must exist."); *Alliance to End Repression v. Rochford*, 565 F.2d 975, 977 (7th Cir.1977) (agreeing that class definitions must be definite enough that the class can be ascertained). We review the district court's decision not to certify a class for abuse of discretion. *Uhl v. Thoroughbred Tech. & Telecomm., Inc.*, 309 F.3d 978, 986 (7th Cir.2002). The district court did not abuse its discretion.

The district court determined that the proposed class was not sufficiently definite to warrant class certification. Oshana

sued Coke for violating the ICFA and for unjust enrichment. To prevail on a claim for damages under the ICFA, Oshana and her fellow class members must prove: (1) a deceptive act or practice by Coke; (2) that the act or practice occurred in the course of conduct involving trade or commerce; (3) that Coke intended Oshana and the members of the class to rely on the deception; and (4) that actual damages were proximately caused by the deception. *Avery v. State Farm Mut. Auto. Ins. Co.*, 216 Ill.2d 100, 296 Ill.Dec. 448, 835 N.E.2d 801, 850 (Ill.2005); *Oliveira v. Amoco Oil Co.*, 201 Ill.2d 134, 267 Ill.Dec. 14, 776 N.E.2d 151, 164 (Ill.2002). In other words, a damages claim under the ICFA requires that the plaintiff was deceived in some manner and damaged by the deception. *Oliveira*, 267 Ill.Dec. 14, 776 N.E.2d at 164 ("*Zekman* [*v. Direct Am. Marketers*, 182 Ill.2d 359, 231 Ill.Dec. 80, 695 N.E.2d 853 (Ill.1998),] makes clear that, to properly plead the element of proximate causation in a private cause of action for deceptive advertising brought under the Act, a plaintiff must allege that he was, in some manner, deceived.").

Membership in Oshana's proposed class required only the purchase of a fountain Diet Coke from March 12, 1999, forward. Such a class could include millions who were not deceived and thus have no grievance under the ICFA. Some people may have bought fountain Diet Coke *because* it contained saccharin, and some people may have bought fountain Diet Coke *even though* it had saccharin. Countless members of Oshana's putative class could not show any damage, let alone damage proximately caused by Coke's alleged deception. *See Oliveira*, 267 Ill.Dec. 14, 776 N.E.2d at 164 (holding that those who "knew the truth" do not have

valid ICFA claims because they cannot claim to have been deceived).

For the same reasons, Oshana's claims were not typical of the putative class. A claim is typical if it "arises from the same event or practice or course of conduct that gives rise to the claims of other class members and ... her claims are based on the same legal theory." *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir.1992). Even though some factual variations may not defeat typicality, the requirement is meant to ensure that the named representative's claims " 'have the same essential characteristics as the claims of the class at large.' " *Retired Chi. Police Ass'n v. City of Chi.*, 7 F.3d 584, 597 (7th Cir.1993) (quoting *De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir.1983)).

Oshana's proposed class includes people who knew fountain Diet Coke contained saccharin and bought it anyway. Oshana, on the other hand, claims she was deceived and injured. Also, Oshana's ICFA claim is subject to certain specific factual defenses that undermine typicality: she admitted she did not see any Coke advertisements during the relevant period and that she knew fountain and bottled Diet Coke were different because bottled Diet Coke tasted better. She also admitted that she continues to drink fountain Diet Coke even though she now knows it contains saccharin. We cannot say the district court's conclusion that Oshana's claims are atypical was an abuse of discretion.[3]

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3. Because we find no abuse of discretion in the district court's consideration of the requirements of Rule 23(a), we need not address the district court's additional conclusion that the requirements of Rule 23(b) were not satisfied.

Oshana contends that this conclusion addresses only her deceptive marketing ICFA claim but not her "per se" ICFA violation claim or her unjust enrichment claim. She argues that it is a per se violation of the ICFA to represent that a product has ingredients it does not have because that is a violation of the Uniform Deceptive Trade Practices Act, and violations of the Uniform Deceptive Trade Practices Act are also violations of the ICFA. 815 Ill. Comp. Stat.. 505/2. Oshana maintains that a per se violation of the ICFA does not require her to show actual damage caused by deception. It is true that a violation of the Uniform Deceptive Trade Practices Act violates the ICFA, 815 Ill. Comp. Stat.. 505/2, but such violations do not automatically entitle an individual to damages. Unlike public actions for violating the ICFA, a private cause of action under the ICFA requires a showing of proximate causation. 815 Ill. Comp. Stat.. 505/10a; *Oliveira*, 267 Ill.Dec. 14, 776 N.E.2d at 160 ("Unlike an action brought by the Attorney General under [815 Ill. Comp. Stat.. 505/2], which does not require that 'any person has in fact been misled, deceived or damaged[,]' . . . a private cause of action brought under [815 Ill. Comp. Stat. 505/10a] requires proof of 'actual damage' . . . . [and] proof that the damage occurred 'as a result of' the deceptive act or practice." (citations omitted)). There is no per se violation that automatically makes Coke liable to Oshana and the members of the proposed class for private damages. Oshana's so-called per se claim suffers from the same typicality infirmities as her deceptive marketing claim.

Her unjust enrichment claim carries similar shortcomings. Oshana cannot show Coke was unjustly enriched unless she shows that Coke benefitted to her detriment, and that Coke's retention of the profits would violate the fundamental principles of justice, equity, and good conscience. *HPI Healthcare Servs., Inc. v. Mt. Vernon Hosp., Inc.*, 131 Ill.2d 145, 137 Ill.Dec. 19, 545 N.E.2d 672, 679 (Ill.1989). Unjust enrichment claims do not necessarily require wrongdoing on the part of the defendant, *see Stathis v. Geldermann, Inc.*, 295 Ill.App.3d 844, 229 Ill.Dec. 809, 692 N.E.2d 798, 812 (Ill.App.Ct.1998), but in this case Coke cannot have been unjustly enriched without proof of deception. As such, the proposed class is not sufficiently identifiable or definite, nor is Oshana's claim sufficiently typical to qualify for class certification.

Affirmed.

APPENDIX B — ORDER OF JUDGMENT UNDER RULE 68 OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED AUGUST 4, 2005

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Case No. 04 C 3596
Judge Suzanne B. Conlon

CAROL BILLIE OSHANA, on behalf of herself and all others similarly situated,

Plaintiff,

v.

THE COCA-COLA COMPANY, a Delaware Corporation,

Defendant.

ORDER OF JUDGMENT UNDER RULE 68

Defendant in the above-titled action having served on Plaintiff an offer to allow judgment to be taken against it pursuant to Rule 68 of the Federal Rules of Civil Procedure as set forth below, and Plaintiff having accepted that offer of judgment in writing within 10 days after service of the offer, and the offer and notice of acceptance with proof of service having been filed by Defendant on August 3, 2005,

Appendix B

IT IS HEREBY ORDERED THAT:

1. Judgment is entered against Defendant in the amount of $650, plus, in addition thereto, reasonable costs and attorney's fees in an amount to be determined by the Court.

2. This judgment is not an admission that Defendant is liable in this action, or that Plaintiff has suffered any damage. This judgment shall have no effect whatsoever except in resolution of this action.

3. Plaintiff reserves all rights to appeal that she and the putative class and its absentee members are entitled to bring on behalf of the putative class she sought to represent, including, but not limited to, the appeal of the Court's decisions denying class certification and the underlying jurisdictional decisions including the denial of Plaintiff's motion to remand.

ORDERED this 4th day of August, 2005.

s/ Suzanne B. Conlon
Hon. Suzanne B. Conlon
United States District Judge

APPENDIX C — MINUTE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS DATED JULY 30, 2004

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS

Name of Assigned Judge or Magistrate Judge Suzanne B. Conlon

CASE NUMBER 04 C 3596 **DATE** 7/30/2004
CASE TITLE HAHN vs. THE COCA-COLA COMPANY

[In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3rd party plaintiff, and (b) state briefly the nature of the motion being presented.]

MOTION:

* * *

DOCKET ENTRY:

* * *

(10) ■ [Other docket entry] The motion to reconsider motion to remand [ ] is denied. SEE REVERSE FOR DETAILS.

s/ Suzanne B. Conlon
Suzanne B. Conlon

Appendix C

(11) ■ [For further detail see order on the reverse side of the original minute order.]

* * *

☑ Notices mailed by judge's staff. AND

☒ Notified counsel by telephone.

* * *

date docketed AUG 02 2004

Docket Number 27

ORDER

David Hahn, an Illinois citizen, filed this class action against the Coca-Cola Company, a Delaware corporation with its principal place of business in Atlanta, for alleged violations of the Illinois Consumer Fraud Act, 815 ILCS 505/1, *et seq.*, and unjust enrichment. Hahn originally filed in the Circuit Court of Cook County. Coca-Cola filed its notice of removal on May 24, 2004. On June 28, Hahn moved to remand the action to state court. The motion to remand was denied. Hahn waived procedural objections to removal by filing the motion to remand late, and the court would have had original jurisdiction over the lawsuit had it originally been filed in federal court. Order of 7/16/04, Doc. No. 24. Hahn moves the court to reconsider.

Appendix C

Motions for reconsideration are disfavored, and serve the limited function of either correcting manifest errors of law or presenting newly-discovered evidence. *Calumet Lumber, Inc. v. Mid-America Industrial, Inc.*, No 95 C 4875, 1996 WL 308243 at *1 (N.D. Ill. 1996). Motions for reconsideration do not provide a vehicle for a party to introduce new evidence or legal theories that could have been presented earlier, nor are they at the disposal of parties who want to rehash the same arguments. *Bank of Waunakee v. Rochester cheese* [*sic*] *Sales, Inc.*, 906 F.2d 1185, 1191 (7th Cir. 1990).

Hahn contends the court mistakenly aggregated the potential value of Coca-Cola's disgorged profits in determining that the value of his claims exceeded $75,000. He asserts that the complaint's disclaimer on individual damages limited any individual award to $75,000 or less. This merely rehashes stale arguments. The court expressly considered whether the amount in controversy exceeded $75,000.

Hahn's request for disgorgement of profits rendered the *ad damnum* ambiguous because it directly contradicted the complaint's disclaimer. Accordingly, Coca-Cola followed the procedure set forth in Local Rule 81.2 and served Hahn with a request to admit that the combined value of any and all individual damages, including potential disgorgement of profits, would not exceed $75,000. Hahn's contention that any individual award of disgorgement is limited by the complaint's disclaimer is belied by his failure to consent to such a limitation. Hahn evasively declined to stipulate the meaning of the *ad damnum* until he filed the motion to

remand, where he then asserted that the face of the complaint clearly limited the value of all individual damage awards. This was too little too late.

LR 81.2 required Hahn's procedural objections to the request to admit be treated as a refusal to agree that the complaint did not seek disgorgement of profits for any individual plaintiff in excess of $75,000. Jurisdiction in this case is not predicated on the aggregate value of a potential class award. *See Del Vecchio v. Conseco, Inc.*, 230 F.3d 974, 977-978 (7th Cir. 2000). Rather, by declining to agree to a limitation on individual disgorgement, Hahn is deemed to have admitted the value of disgorged profits is in controversy for an individual plaintiff. *See Lilly v. Ford Motor Co.*, No. 00 C 7373, 2001 WL 1001158 at *2 (N.D. Ill. Aug. 24, 2001); *In re Brand Name Prescription Drugs Antitrust Litigation*, 248 F.3d 668, 671 (7th Cir. 2001). Coca-Cola's contention that disgorgement of profits to any individual plaintiff would result in a multi-million dollar damage award was uncontested. Accordingly, the complaint's prayer for relief, combined with the potential value of disgorgement, established the plausibility of Coca-Cola's good-faith estimate that the stakes in the case satisfy the jurisdictional minimum. *See Rubel v. Pfizer*, 361 F.3d 1016, 1020 (7th Cir. 2004).

s/ Suzanne B. Conlon
Suzanne B. Conlon

APPENDIX D — MINUTE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS DATED JULY 16, 2004

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS

Name of Assigned Judge or Magistrate Judge Suzanne B. Conlon

CASE NUMBER 04 C 3596 **DATE** 7/16/2004
CASE TITLE HAHN vs. THE COCA-COLA COMPANY

[In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3rd party plaintiff, and (b) state briefly the nature of the motion being presented.]

MOTION:

* * *

DOCKET ENTRY:

* * *

(10) ■ [Other docket entry] Plaintiff's motion to remand [18-1] is denied. SEE REVERSE FOR DETAILS.

s/ Suzanne B. Conlon
Suzanne B. Conlon

Appendix D

(11) ■ [For further detail see order on the reverse side of the original minute order.]

* * *

☑ Notices mailed by judge's staff.

* * *

date docketed 07/19/04

Docket Number 24

ORDER

David Hahn, an Illinois citizen, filed this class action against the Coca-Cola Company, a Delaware corporation with its principal place of business in Atlanta, for alleged violations of the Illinois Consumer Fraud Act, 815 ILCS 505/1, *et seq.*, and unjust enrichment. Hahn alleges Coca-Cola deceived him by failing to disclose that fountain Diet Coke contains saccharin. The lawsuit was originally filed in the Circuit Court of Cook County. Coca-Cola filed its notice of removal on May 24, 2004. On June 28 Hahn filed this motion to remand.

A defendant may remove a case to federal court within 30 days of service of the complaint or receipt of "a copy of an amended pleading, motion, order *or other paper* from which it may first be ascertained that the case is one which is or has become removable." 28 U.S.C. § 1446(b). If the complaint lacks an express *ad damnum* that meets the

$75,000 jurisdictional amount, Local Rule 81.2 instructs defendants to include in the notice of removal: (1) a statement of good faith belief that the amount in controversy satisfies the jurisdictional amount; and (2) at least one plaintiff's admission or refusal to respond to an interrogatory or request for admission that the damages sought in the complaint exceed $75,000. Because Hahn's *ad damnum is* ambiguous, Coca-Cola served him with a request to admit regarding the amount in controversy, and then filed notice of removal under LR 81.2. Hahn contends Coca-Cola's resort to LR 81.2 is improper. He argues the *ad damnum* was straightforward, thereby rendering Coca-Cola's removal untimely because notice of removal was filed more than 30 days after service of the complaint. *See, e.g., Hanlon v. XY Tool & Die, Inc.*, No. 04 C 410, 2004 WL 838035 (N.D. Ill. April 16, 2004).

This court need not consider Hahn's objections to Coca-Cola's removal because his own motion to remand is untimely under 28 U.S.C. § 1447(c). Coca-Cola removed this case on May 24; Hahn's motion to remand was due by June 23. Hahn was five days late. By failing to satisfy § 1447(c)'s requirements, Hahn waived any objection to the procedure Coca-Cola followed in removing the case. *In re Continental Casualty Co.*, 29 F.3d 292, 294-95 (7th Cir. 1994). Hahn's objections are not jurisdictional in nature. Untimeliness of removal is a procedural defect. LR 81.2 is simply a procedural mechanism for determination of jurisdictional facts. *Id.*; *Rubel v. Pfizer, Inc.*, 361 F.3d 1016, 1019 (7th Cir. 2004). Hahn's failure to move for remand within 30 days is fatal. *Id.* at 294.

Appendix D

Although Coca-Cola satisfied the procedural requirements of both LR 81.2 and § 1447, it nevertheless must establish to a reasonable probability that removal was proper. *Smith v. American General Life and Accident Insurance Company, Inc.*, 337 F.3d 888, 892-93 (7th Cir. 2003). The parties are unquestionably diverse. Coca-Cola must establish the amount in controversy exceeds $75,000. Hahn argues the complaint expressly limits each class member's recovery to less than $75,000. The complaint contains disclaimers of "individual damages." Compl ¶¶ 6, 9. Paragraph 6 states that Hahn seeks no relief that would confer federal jurisdiction, "and expressly disclaims individual damages in excess of $75,000." However, this express language is directly contradicted by the prayer for relief in paragraph 9, which includes disgorgement of Diet Coke profits. Compl. ¶ 9. Disgorgement of Diet Coke profits would obviously exceed $75,000. Hahn's contention that the *ad damnum* is clear is belied by his evasiveness in responding to Coca-Cola's request to admit he does not seek damages in excess of $75,000. *Robinson v. Mars, Inc., No.* 03 C 4682, 2003 U.S. Dist. LEXIS 17529, *2-3 (N.D. Ill. Oct. 1, 2003); *Lilly v. Ford Motor Co.*, No. 00 C 7372, 2001 WL 1001158 at *2 (N.D. Ill. Aug. 24, 2001).

A plaintiff is the master of his complaint, and may choose to litigate in state court by stipulating to a limitation on damages. *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913); *In re Brand Name Prescription Drugs Antitrust Litigation*, 248 F.3d 668, 671 (7th Cir. 2001). However, Hahn may not preclude removal by evasive tactics concerning the value of relief he seeks. It realistically appears that the value of relief he seeks exceeds $75,000. *Rubel*, 361 F.3d at 1020.

Appendix D

Hahn declined to stipulate the meaning of the complaint's *ad damnum* until he moved for remand. Coca-Cola complied with LR 81.2 and attached Hahn's responses to its request to admit. LR 81.2(a)(2)(B) clearly requires Hahn's procedural objections to be treated as a refusal to agree that individual damages will not exceed $75,000. Coca-Cola's contention that disgorgement of profits would result in a multimillion dollar award is uncontested. Notice of Removal at ¶ 5. The complaint's prayer for relief, combined with the value of disgorgement, establish that Coca-Cola's good faith estimate that the stakes in this case exceed $75,000 is plausible. Removal of the case to this court was proper. *Rubel,* 361 F.3d at 1020.

Hahn's contention he is entitled to object to Coca-Cola's request to admit misses the point. The complaint suggests the amount in controversy may exceed $75,000. Although poorly phrased, the request to admit merely seeks clarification of the individual damages sought in the prayer for relief. The request does not implicate attorney-client privilege or the work product doctrine. Refusal to stipulate does not establish federal jurisdiction. *In re Brand Name Prescription Drugs Antitrust Litigation,* 248 F.3d at 671. By declining to agree to a limitation on disgorgement, Hahn is deemed to admit that the value of disgorged profits plausibly exceeds $75,000.

s/ Suzanne B. Conlon
Suzanne B. Conlon

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED JANUARY 29, 2007

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

January 29, 2007

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*

Hon. MICHAEL S. KANNE, *Circuit Judge*

Hon. DIANE S. SYKES, *Circuit Judge*

No. 05-3640

CAROL B. OSHANA,

Plaintiff-Appellant,

v.

COCA-COLA COMPANY, a Delaware corporation,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Appendix E

No. 04 C 3596

Suzanne B. Conlon,
Judge.

ORDER

On consideration of the petition for rehearing en banc, no judge in active service has requested a vote on the petition for rehearing en banc.[1] It is therefore ordered that the petition for rehearing en banc is DENIED.

1. The Honorable Joel M. Flaum did not participate in the consideration of this petition for rehearing en banc.

APPENDIX F— STATUTE AND RULES INVOLVED

28 U.S.C.A. § 1332

§ 1332. Diversity of citizenship; amount in controversy; costs

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—
>
> > (1) citizens of different States;
> >
> > * * *
>
> (c) For the purposes of this section and section 1441 of this title—
>
> > (1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and
> >
> > * * * *

Appendix F

Local Rule 81.2 of the Northern District of Illinois
("L.R.81.2")

* * *

Where one or more defendants seek to remove an action from an Illinois state court based upon diversity of citizenship, and where the complaint does not contain an express *ad damnum*, as to at least one claim asserted by at least one plaintiff, in an amount exceeding the jurisdictional amount in controversy . . . the notice of removal shall include in addition to any other matters required by law:

(1) a statement by each of the defendants previously served in the state court action that it is his, her or its good faith belief that the amount in controversy exceeds the jurisdictional amount; and

(2) with respect to at least one plaintiff in the Illinois action, either—

(A) a response by such plaintiff to an interrogatory or interrogatories (see Ill.S.Ct. Rule 213) as to the amount in controversy, either (i) stating that the damages actually sought by that plaintiff exceed the jurisdictional amounts or (ii) declining to agree that the damage award to that plaintiff will in no event exceed the jurisdictional amount; or

(B) an admission by such plaintiff in response to a request for admissions (*see* Ill.S.Ct. Rule 216(a)), or a showing as to the deemed admission by such plaintiff by reason of plaintiff's failure to serve a timely denial to such a request (*see* Ill.S.Ct. Rule 216(c)), in either event conforming to the statement or declination to agree described in subparagraph (2)(A) of this rule.

* * * *

Rule 216. Admission of Fact or of Genuineness of Documents

(a) Request for Admission of Fact. A party may serve on any other party a written request for the admission by the latter of the truth of any specified relevant fact set forth in the request.

* * *

(c) Admission in the Absence of Denial. Each of the matters of fact and the genuineness of each document of which admission is requested is admitted unless, within 28 days after service thereof, the party to whom the request is directed serves upon the party requesting the admission either (1) a sworn statement denying specifically the matters of which admission is requested or setting forth in detail the reasons why he cannot

truthfully admit or deny those matters or (2) written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part. If written objections to a part of the request are made, the remainder of the request shall be answered within the period designated in the request. A denial shall fairly meet the substance of the requested admission. If good faith requires that a party deny only a part, or requires qualification, of a matter of which an admission is requested, he shall specify so much of it as is true and deny only the remainder. Any objection to a request or to an answer shall be heard by the court upon prompt notice and motion of the party making the request.

* * *

(e) Effect of Admission. Any admission made by a party pursuant to request under this rule is for the purpose of the pending action and any action commenced pursuant to the authority of section 13-217 of the Code of Civil Procedure (Ill.Rev.Stat.1983, ch. 110, par. 13-217) [FN1] only. It does not constitute an admission by him for any other purpose and may not be used against him in any other proceeding.

[FN1] 735 ILCS 5/13-217.

* * * *

(2)

No. 06-1443

FILED
JUN 6 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

CAROL BILLIE OSHANA,
on behalf of herself and all others similarly situated,

Petitioner,

v.

COCA-COLA COMPANY, A Delaware corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONER

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Since the filing of petitioner Carol Billie Oshana's ("Petitioner") Petition for a Writ of *Certiorari*, a new development has occurred which further compels that the Court grant *certiorari*. As Petitioner noted in her opening brief, the Opinion of the Seventh Circuit Court of Appeals, "if left standing, would wreak havoc with the established clarity on this fundamental issue of federal jurisdiction." Cert. Petition at 4. Havoc has commenced.

On June 1, 2007, in *Oshana v. PepsiCo*, No. 07 CV 352, pending in the United States District Court for the Northern District of Illinois, the court held that the Seventh Circuit "has ruled that the *ability to amend* was enough to establish removability," and thus, it was compelled to remand the case. *See* Order at 1 (Moran, J., June 1, 2007) (emphasis added), at Appendix 1. Such a ruling is now viewed as required in the Seventh Circuit by a judge as learned as Senior District Court Judge James B. Moran. So strong is the impact of the Seventh Circuit's Opinion that the current denial of remand occurred even though Judge Moran had previously granted two motions to remand that very case. As set forth in Plaintiff's Petition for a Writ of *Certiorari*, that conclusion is contrary to the multitude of statutes, rules, and precedent dealing with federal jurisdiction. If left unattended, it will cause serious damage to established principles of federal jurisdiction, foster uncertainty and inequality in the application of the law, and will leave standing a glaring split between the Circuit Courts of Appeals.

CONCLUSION

For the reasons stated, Petitioner Carol Billie Oshana respectfully requests that the Court accept review of this legal controversy, and further requests an Order 1) reversing the judgment of the Seventh Circuit affirming removal of her case to federal court based on the jurisdictional amount in controversy being in excess of $75,000, and 2) remanding this case to the Circuit Court of Cook County, Illinois, for further proceedings on Petitioner's state law claims.

Respectfully submitted,

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APPENDIX

APPENDIX — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED JUNE 1, 2007

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 07 C 352

CAROL BILLIE OSHANA, on behalf of herself and all others similarly situated,

Plaintiff,

vs.

PEPSICO, INC., a North Carolina corporation,

Defendant.

MEMORANDUM OPINION AND ORDER

Plaintiff moves for reconsideration of the denial of her motion to remand. That motion is denied. The Court of Appeals has ruled that the ability to amend was enough to establish removability. And while the third removal was well over a year later, we think the rather peculiar circumstances satisfy the catchall provision of Rule 60(b)(6) of the Federal Rules of Civil Procedure, because the removal was shortly after the ruling in Judge Conlon's case. The bottom line is that two almost identical cases were headed in different directions, the Court of Appeals determined what it considered to be the appropriate direction, and this case should follow that same direction.

Appendix

s/ James B. Moran
JAMES B. MORAN
Senior Judge, U. S. District Court

June 1, 2007.